IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 586 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA
and
Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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SOMABHAI RAMJIBHAI CHOWHAN

Versus

STATE OF GUJARAT

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Appearance:

1. Criminal Appeal No. 586 of 1998

MR VIPUL S MODI for Petitioner No. 1

MR AY KOGJE AGEP for Respondent No. 1

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CORAM : MR.JUSTICE B.J.SHETHNA
and
MR.JUSTICE M.S.SHAH

Date of decision : 15/01/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE B.J.SHETHNA)

#. The appellant-accused has challenged in this appeal the impugned judgment and order of conviction and sentence dated 7.4.1998 passed by the learned Additional Sessional Judge, Banaskanta at Palanpur convicting the accused for the offence under Section 302 IPC and sentenced him to suffer life imprisonment. The appellant is the husband of deceased-Mehmudaben. As per the prosecution case, accused came in a drunken condition at about 8.30 p.m. on 22.10.1990 and beaten his wife Mehmudaben by giving fist and kick blows and thereafter poured kerosene on her and then set her at blaze. The accused had another wife and because of that quite often they had quarrels. The incident in question took place at about 10.00 p.m. where she was burnt alive and immediately she ran to the hospital in a burnt condition. Her husband-accused followed her. At the time of incident, except deceased and accused no one else was present in the house.

#. Dr.Babubhai Sutharia PW.1 Ex.6 immediately sent yadi at 10.30 p.m. to the police. Shri Ratuji Shivji, Head Constable, PW.6 Ex.28 recorded her statement to the effect that she was burnt alive by her husband by pouring kerosene. On receiving the intimation, the Executive Magistrate, Shri Sumra PW.2 Ex.16 reached the hospital and after ascertaining the fact that deceased-Mehmudaben was completely in conscious condition and able to speak, he recorded dying declaration of Mehmudaben between 11.50 p.m. of 22.10.1990 to 23.10.1990 up to 0.10 a.m. hrs. Shri Lavjibhai Pranami, PSI, who has investigated the case also recorded the dying declaration of deceased-Mehmudaben, which was treated as FIR Ex.42. Initially, case was registered against the accused for the offence under Section 307 IPC. However, Section 302 IPC was added after deceased-Mehmudaben died due to burn injuries. Accused was arrested early in the morning hours at 2.30 on 3.10.1990. Panchnama of seen of offence was prepared on 23.10.1990 between 7.00 to 8.00 a.m. After completing the investigation, the police submitted charge sheet against the accused before the Trial Court for the offence under Section 302 IPC for committing murder of his wife-Mehmudaben. The accused in his statement under Section 313 of Criminal Procedure Code has denied the fact of pouring kerosene on his wife and set her at blaze. He had come out with the defence that he had tried to extinguish the fire. A specific question was put to him in his examination under Section 313 that

as per the evidence of Jayaben when deceased-Mehmudaben started running he had also fallowed Mehmudaben and gone to dispensary to which he had stated that he had gone to hospital i.e. the only fact. Except that no other defence was pleaded before the Trial Court.

#. Considering the oral as well as documentary evidence lead by the prosecution, which includes as many as three dying declarations; (1) oral dying declaration of deceased-Mehmudaben Ex.7 before Head Constable-Ratuji Shivji at the earliest point of time i.e. about 10.30 p.m.; (2) second oral dying declaration made by deceased-Mehmudaben Ex.18 before Deputy Mamlatdar and Executive Magistrate Mr.Sumra and (3) oral dying declaration Ex.42, which was treated as F.I.R. made by deceased-Mehmudaben before P.S.I., Shri Pranami and Panchnama of seen of offence Ex.44 and also considering the evidence of the accused, the learned Judge came to the conclusion that the prosecution proved its case against the accused beyond reasonable doubt and convicted the appellant-accused for the offence under Section 302 IPC and sentenced him to suffer life imprisonment. That order is challenged in this appeal by the appellant.

#. Learned counsel Shri Modi for the appellant-accused firstly submitted that there is lot of discrepancies in all the three dying declarations alleged to have made by deceased-Mehmudaben. He also submitted that when deceased-Mehmudaben had 90% burns injuries then she would not be able to speak, therefore, there is no question of making any dying declaration. From the medical certificate of deceased-Mehmudaben he submitted that she was given number of injections and pain killers, therefore, it would not be possible for her to make any dying declaration. He, therefore, submitted that the appellant-accused is entitled for benefit of doubt.

#. We have carefully gone through all the three dying declarations made by the deceased-Mehmudaben, two of them i.e. Ex.7 and Ex.42 made before police; Ex.7 made before Head Constable Raturaj Shivji and Ex.42 made before the P.S.I. Shri Pranami, Ex.7 is a brief statement of deceased-Mehmudaben wherein she had only stated that her husband burnt her alive. Whereas, Ex.42 is an exhaustive dying declaration. Both the witnesses Raturaj Shivji, Head Constable, PW.6 and Shri Pranami, P.S.I., PW.9, Ex.41 stood the test of cross-examination and nothing much turned out in their cross-examination. In addition to these two dying declarations, there is one more dying declaration, which is at Ex.18 made before the Deputy Mamlatdar and Executive Magistrate, Mr.Sumra, which is

recorded soon after the incident i.e. at about 11.50 p.m., which was over by 12.10 a.m. of the next day i.e. 23.10.1990. Mr.Sumra was examined at great length. But his evidence totally remained unshaken in his cross-examination. In absence of any material discrepancy in the evidence of all the three witnesses, Shri Sumra, Executive Magistrate, Shri Pranami, P.S.I. and Shri Ratuji Shivji, Head Constable, we are not prepared to accept the submission of Mr.Modi that the deceased was not in a position to make her statement or dying declaration before them. Dr.Babubhai Sutharia, PW.1 Ex.6 has clearly stated in his evidence that deceased-Mehmudaben was absolutely in a fit condition to give her statement. When he had examined her she was absolutely conscious. Merely because the deceased had 90% of burns injuries and that her medical certificate shows that she was given number of injunctions and medicines for sedation that would not discard the oral testimony of all the three witnesses when nothing was alleged against them in their cross-examination that either they were hostile to the accused or they were trying to unduly support the prosecution at the instance of the relatives of the deceased.

#. In support of his above contention Modi has tried to rely upon decision of the Hon'ble Supreme Court in case of State of Assam Vs. Mafizuddin Ahmed reported in (1983) 2 SCC 14. Mr.Modi submitted that when truthfulness of all the three dying declarations made by deceased Modi is in doubt and that the accused himself has received injuries on his hands while trying to save his wife, then the accused should be given benefit of doubt. We are not in a position to accept the submission of Mr.Modi in view of the fact that all the three dying declarations made before different persons at different times by deceased are found to be absolutely trustworthy by us. There is no material improvement in any of the dying declarations. The deceased-Mehmudaben right from the beginning telling that she was burnt alive by pouring kerosene by her husband. In that view of the matter, we are unable to accept the submission of Mr.Modi.

#. Mr.Modi then relying upon the judgment of the Hon'ble Supreme Court in the case of Dandu Lakshimi Reddy Vs. State of A.P. reported in (1999)7 SCC 69 submitted that when the evidence of neighbour Jayaben is in contradiction with the dying declarations made by deceased-Mehmudaben before the above three persons, then the accused should be given benefit of doubt. He has taken us through the evidence of Jayaben PW.5 Ex.25. Jayaben has only stated in her evidence that first

quarrel took place between deceased-Mehmudaben and her husband-accused at 8.30 p.m., which was subsided and thereafter at about 10.00 p.m. main incident took place where deceased-Mehmudaben came out from the house with burns injuries and appellant-accused followed her trying to extinguish the fire. At that time deceased-Mehmudaben started running by saying that she is going to hospital and she was followed by her husband-Somabhai but she did not go to the hospital. She has clearly stated in her evidence that the incident took place inside the house, therefore, she is not in a position to say that how the actual incidence took place. It may be that deceased-Mehmudaben in an attempt to save her life after she was burnt alive had rushed to the hospital without narrating the detailed version of the incident to witness-Jayaben. But that fact itself would not be sufficient to discard her three dying declarations made before three different authorities. Evidence of Jayaben, PW-5 rather corroborates the version of deceased-Mehmudaben in her dying declarations that quarrel took place between her and her husband at about 8.30 p.m. on the day of incident and after the intervention of Jayaben it was subsided. However, within a period of less than one and half hour the actual incident of burning took place at 10.00 p.m. in the house of the deceased and at that time except Mehmudaben and her husband, no one else was present in the house.

#. Learned APP, Shri Kogje for respondent-State of Gujarat has relied upon judgment of Hon'ble Supreme Court in case of Kanaksingh Raisingh Rav Vs. State of Gujarat reported in (2003) 1 SCC 73 and submitted that when deceased-Mehmudaben was conscious and able to make her statement, then there should not be any impediment in relying upon such declaration. As stated earlier, we are fully satisfied that she was absolutely conscious and in a position to make statement before three different persons. As stated earlier, we are fully convinced that the dying declarations made by the deceased-Mehmudaben are wholly reliable for convicting the accused.

#. At this stage, we must state that an attempt was made by Mr.Modi to show that Mehmudaben got accidental fire while cooking and the accused tried to extinguish the fire. However, Jayaben, PW-5 clearly denied the suggestion that while cooking deceased-Mehmudaben received burns injuries due to the accident.

##. From the evidence of the prosecution witnesses and dying declarations made by the deceased, it is crystal clear that the accused had set his wife at blaze. When

she had received almost 90% burns injuries, then to make a show he had tried to extinguish the fire by pouring water on Mehmudaben. However, Mehmudaben came out from the house and rushed to the hospital for taking immediate treatment, but unfortunately, later on she succumbed to the injuries.

##. In view of the peculiar fats of the case, none of the aforesaid judgments of the Hon'ble Supreme Court of India cited by Mr.Modi will have any help to the appellant-accused.

##. In view of the above discussion, we do not find any merits in the half-hearted submission made by Mr.Modi that at the most offence under Section 304 Part-I or 304 Part-II IPC is committed by the appellant-accused and not under Section 302 IPC. In the instant case, before actual incident of burning, the appellant-accused had quarrel with his deceased wife. At that time, he was in drunken condition. After they were pacified by their neighbours within one and half hours the accused poured kerosene on his wife-Mehmudaben and set her at blaze in their house. At that time he made a show of saving his wife by pouring water to save himself when she tried to run away from the house more particularly when his wife received 90% of burns injuries and there were hardly any chances of her survival. Thus, the case of the appellant-accused does not fall in any of the exceptions, therefore, there is no question of convicting the accused either under Section 304 Part-II or 304 Part-I IPC.

##. In view of the above discussion, we are fully satisfied that the learned Judge has rightly convicted the appellant-accused for the major offence under section 302 IPC.

##. In view of the above discussion, this appeal fails and is hereby dismissed.

(B.J.Shethna, J.)

(M.S.Shah, J.)
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